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May 19, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 18, 2005

Case Number: TSO-0310

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for access authorization. For the reasons detailed below, it is my decision that the Individual is eligible for access authorization.

I. Applicable Regulations

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if the must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has

the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). Again, the burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

## II. Background

The Individual began working at a DOE facility in 1991. The Individual was granted a clearance in 1993.

In June 2003, the Individual completed a security questionnaire (QNSP). DOE Ex. 8. Question 24 inquired about illegal use of any controlled substance. The Individual disclosed (i) a one-time marijuana use in 2001 and (ii) use of Vicodin for back pain, also in 2001.

In April 2005, a DOE personnel security specialist interviewed the Individual. DOE Ex. 13. During the interview (the PSI), the Individual confirmed his use of marijuana and Vicodin. He stated that he took two puffs of a marijuana cigarette when he was visiting a relative (Relative No. 1), probably in the late 1990s. *Id.* at 11. He further stated that he obtained about five Vicodin pills from another relative (Relative No. 2), when he exhausted his own prescription before the refill date. *Id.* at 19-23.

In August 2005, the DOE notified the Individual that his clearance was suspended. The DOE stated that the marijuana and Vicodin use constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(k) (Criterion K) (illegal drug use) and 10 C.F.R. § 710.8(l) (Criterion L) (unusual conduct raising a doubt whether an individual is honest, reliable, and trustworthy). Notification Letter, August 29, 2005. Upon receipt of the Notification Letter, the Individual requested a hearing. See Individual's Letter, September 13, 2005. The DOE forwarded the request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me to serve as the hearing officer.

At the hearing, the Individual did not dispute that the incidents give rise to a security concern. Rather, the Individual argued that the incidents were aberrations and that

he is honest, reliable, and trustworthy. To support his position, the Individual submitted documentary evidence and presented witnesses.

### III. The Evidence

#### A. Documentary Evidence

Medical records show that the Individual had back pain for which his physician prescribed Vicodin. A letter from Relative No. 2 states that the Individual obtained Vicodin from her on two occasions when his own prescription run out several days before the renewal date. A memorandum from the personnel security division shows that a January 2006 screening for drugs and alcohol was negative.

Letters and references from three neighbors, five work colleagues, and a church member attest to the Individual's fine character. They describe the Individual as devoted to his job, his family, and his church. They further described him as honest, reliable, and trustworthy, and someone who would not use drugs.

The Individual's performance appraisals and a variety of achievement awards indicate that the Individual is a valued employee who regularly meets or exceeds expectations. Finally, a memorandum from the personnel security division shows the absence of any security infractions.

#### B. The Hearing Testimony

The DOE Counsel did not present any witnesses at the hearing. The Individual testified and presented six witnesses: his wife, Relative No. 1, two friends from church, and two supervisors.

##### 1. The Individual

The Individual testified about the marijuana use. Transcript (hereinafter "Tr.") at 78 et seq. The Individual stated that the marijuana incident occurred when he was visiting Relative No. 1. The Individual confirmed his PSI description, in which he stated that he took two puffs of a marijuana cigarette that was being passed around. See, e.g., Tr. at 80, 86. The Individual stated that when he thought about it afterward, he felt "really bad." *Id.* at 80. He stated, "[I]t has bothered me for a long time." *Id.* With respect to the Vicodin use, the Individual stated that on two occasions, he asked Relative No. 2

for two or three of her pills because it was several days before he could renew his prescription. *Id.* at 87. The Individual stated that he understands why the foregoing incidents raise security concerns and that they will not happen again. *Id.* at 82, 83.

## 2. The Individual's Wife

The Individual's wife testified that the Individual spends his non-working hours in a variety of activities involving their children and church. See, e.g., Tr. at 8-10. She described those activities in detail. *Id.* at 9-10, 17-22. She further testified that she has never known her husband to engage in any illegal drug use, except for the incidents at issue here, which he told her about after he completed his QNSP. *Id.* at 11. She testified that she was "disappointed" and that the Individual was "disappointed or ashamed" to talk about it. *Id.* at 13. As for the marijuana use, she stated that Relative No. 1 had completed a rehabilitation program and was now substance free. *Id.* at 24-26. The overall thrust of her testimony was that the incidents at issue were out-of-character and that the Individual was trustworthy.

## 3. Relative No. 1

Relative No. 1 testified about the marijuana use. He corroborated the Individual's account of the event, i.e., that during a visit to Relative No. 1, the Individual took a couple of puffs of a marijuana cigarette that was being passed around. Tr. at 72. Relative No. 1 stated that he believes that that was the only time that the Individual used an illegal substance. *Id.* Relative No. 1 described personal losses that he had experienced and his recovery from substance abuse, and he stated that the Individual had helped him through those difficulties. *Id.*

## 4. Friend No. 1

Friend No. 1 has known the Individual for 17 years. Tr. at 49. She has participated in a number of church activities with the Individual, including youth trips, family campouts, and charitable endeavors. *Id.* at 49. She has seen him counsel church youth about the negative consequences of illegal drug use. *Id.* at 54. She testified, "I trust him, and I hope you do too." *Id.*

5. Friend No. 2

Friend No. 2 is a youth pastor. He has worked with the Individual over the last nine months in church-sponsored activities. Tr. at 58. Friend No. 2 mentioned the charitable work that the Individual does with Friend No. 1, and he discussed the Individual's participation in various youth activities. He described those activities as consisting of weekly meetings, camps, and mission trips. Id. at 58-60. He described the mission trips as tutoring children at homeless shelters, delivering food to HIV patients, and working in an Alzheimer's home. Id. He described the Individual's extensive involvement in these activities, some of which required the Individual to use his own vacation time. Id. at 64-65.

6. Supervisor No. 1

Supervisor No. 1 testified that he has known the Individual for some time. Tr. at 33. Supervisor No. 1 stated that the Individual was "honest," "trustworthy," and "reliable." Id. at 33-34. The supervisor described the Individual as "careful" in following rules and stated that he had "complete faith" in the Individual. Id. at 37, 39.

7. Supervisor No. 2

Supervisor No. 2 testified that she has known the Individual for five years. Tr. at 41. She described him as "trustworthy." Id. at 44. She attributed the incidents at issue to being "human" and "making mistakes." Id. at 44.

IV. Applicable Standard

The decision whether to grant access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the

potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. 10 C.F.R. § 710.7(c).

## V. Analysis

The Individual does not dispute that the incidents that he disclosed give rise to a security concerns under Criteria K and L. Instead, the Individual offers evidence and testimony to resolve the concerns.

I am convinced from the testimony that the Individual's time is divided between work, family, and church. The Individual presented witnesses from all three facets of his life, and I believe that the witnesses know the Individual well and that they testified honestly and candidly. Based on the evidence and testimony, I am convinced that the incidents giving rise to the security are isolated and will not recur and that the Individual has resolved the concern about whether he is honest, reliable, and trustworthy.

### A. Criterion K

Criterion K concerns illegal drug use. The DOE's zero tolerance for illegal drug use is well-known.

The Individual has established that his illegal drug use was very limited. He brought forward evidence and testimony on the two matters at issue: the marijuana use and the Vicodin use.

The Individual's assertion that his marijuana use was an isolated incident is well-corroborated. Relative No. 1 corroborated the Individual's account of the incident. Tr. at 72. Relative No. 1 testified that he believes that the Individual has not used an illegal drug on any other occasion. *Id.* The other witnesses testified that they did not know of any illegal drug use and that it was inconsistent with the Individual's character and conduct. See, e.g., Tr. at 11 (the Individual's wife); 54 (Friend No. 1). Consistent with their testimony, the Individual has not testified positive for illegal drugs.

The Individual's assertion that his use of Relative No. 2's Vicodin was limited is also well corroborated. As an initial matter, I note that the Individual's medical records corroborate his testimony that he had a prescription for Vicodin for back pain. Relative No. 2 corroborated the Individual's testimony

that he borrowed two or three pills from her on two occasions. See Letter from Relative No. 2, February 8, 2006.

A significant period of reformation and rehabilitation has occurred. Both incidents are five or more years in the past. The Individual disclosed those incidents to the DOE three years ago. Since that time he has been candid with the DOE about the incidents and expressed remorse for the incidents.

I have concluded that the Individual has resolved the Criterion K security concern arising from the marijuana and Vicodin use. I base this conclusion on the isolated nature of the incidents, the passage of five or years since they occurred, the Individual's disclosure of the incidents three years ago, the Individual's expression of remorse, and the other evidence and testimony indicating that these incidents were aberrations.<sup>1</sup> Having concluded that the Individual has resolved the Criterion K concern, I turn to the Criterion L concern.

#### B. Criterion L

Criterion L concerns whether an individual is honest, reliable, and trustworthy. It is difficult for an individual to resolve the Criterion L concern that arises from use of an illegal substance while holding a clearance. As stated above, DOE's zero tolerance policy for drug use is well-known. Individuals seeking to resolve the concern must establish that, despite this breach of trust, DOE can trust them.<sup>2</sup>

As discussed in Part A above, I have concluded that the incidents were an aberration in an otherwise highly responsible individual. Given the passage of time, the Individual's disclosure of the incidents to the DOE, the Individual's level of remorse and the testimony of other witnesses that he is highly reliable, honest, and trustworthy, I have concluded that the Individual has resolved the Criterion L concern.<sup>3</sup>

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<sup>1</sup> See, e.g., *Personnel Security Hearing*, Case No. TSO-0251 (2005), 29 DOE ¶ 82,864 (2005) (Criteria K and L concerns resolved based on similar circumstances).

<sup>2</sup> See e.g., *Personnel Security Hearing*, Case No. VSO-0430, 28 DOE ¶ 82,503 (2001); *Personnel Security Hearing*, Case No. VSO-0394, 28 DOE ¶ 82,781 (2001); *Personnel Security Hearing*, VSO-0307, 27 DOE ¶ 82,837 (2000); *Personnel Security Hearing*, Case No. VSO-0136, 26 DOE ¶ 82,778 (1997).

<sup>3</sup> See case cited in note 1, *supra*.

V. Conclusion

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual's eligibility for a security clearance. I also find sufficient evidence in the record to fully resolve that doubt. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual's access authorization should be restored.

Janet N. Freimuth  
Hearing Officer  
Office of Hearings and Appeals

Date: May 19, 2006



